UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

NEXSTAR BROADCASTING GROUP, INC.
d/b/a WIVB-TV

Respondent- Employer

v. Case 03-CA-210156

NATIONAL ASSOCIATION OF
BROADCAST EMPLOYEES
AND TECHNICIANS –
COMMUNICATION WORKERS
OF AMERICA, AFL-CIO

Charging Party -Union

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NEXSTAR BROADCASTING GROUP, INC., properly denominated as NEXSTAR BROADCASTING, INC. d/b/a WIVB-TV (hereinafter "Nexstar" or "Respondent") by one its attorneys Charles W. Pautsch of PAUTSCH, SPOGNARDI & BAIOCCHI LEGAL GROUP LLP hereby provides its BRIEF IN SUPPORT OF ITS' MOTION FOR SUMMARY JUDGMENT, and for other relief as appropriate, filed herein pursuant to Section 102.24 of the NLRB Rules and Regulations, and submits herein the following statement of undisputed material facts, along with an attached Affidavit, and arguments of law, in support of its Motion for Summary

Judgment seeking dismissal of the Complaint against it and a finding that it has not violated Sections 8(a)(1) and (5) of the National Labor Relations Act as it has not unlawfully changed any of the terms and conditions of its employees represented by NABET-CWA.

I. STATEMENT OF MATERIAL FACTS

1. Nexstar and NABET-CWA have a collective bargaining agreement relationship governing a bargaining unit of "Television Technicians, News Photojournalist/Editors, Artists, Producer/Directors, and Producer/Assignment Editors" employed at the WIVB-TV station in Buffalo, New York. (T. Underwood Affidavit, paragraph 2, hereinafter abbreviated as "TU Aff. 2")
2. These parties, (and Nexstar's predecessors in interest), have been parties to successive bargaining agreements for many years. (TU Aff. 4)
3. Nexstar is a successor to Media General that purchased the station from LIN Television, the Employer that entered into the three most recent collective bargaining agreements with NABET- CWA governing the unit at WIVB-TV in 2005, 2010 and 2013. Media General acquired the station in 2015, and Nexstar acquired the station when it acquired Media General through merger which closed in January of 2017. At the time of the acquisition Nexstar assumed the collective bargaining agreement between the station and NABET-CWA. (TU Aff. 5-7)
4. The proper corporate name of the Employer is Nexstar Broadcasting, Inc. d/b/a WIVB-TV, not Nexstar Broadcasting Group, Inc. which is a misnomer and is incorrectly set out as the Respondent in the caption of the Charge and Complaint.
5. The parties (Nexstar and NABET) are currently in the process of negotiations on the contract written to expire on March 26, 2017. The parties verbally agreed to extend this

collective bargaining agreement at the first negotiating meeting between the parties in Buffalo, on February 23 and 24, 2017, and pursuant to that verbal extension the Union has filed grievances regarding the failure to check-off dues on a timely basis, and the company has responded to these grievances. (TU Aff. 8)

6. The company has endeavored to bargain in good faith during the process of negotiations and has faithfully honored and upheld all terms of the existing collective bargaining agreement. (TU Aff. 9)

7. The most recent Agreement between the Parties contains a lengthy section of the Agreement to deal with the topic of leaves of absence for union business and "other" leaves. (TU Aff. 10) This provision states:

> **13.0 LEAVE OF ABSENCE - UNION AND OTHER**
>
> The Company will endeavor to arrange leave for Union activity upon written request to not more than one (1) Employee at any time for specific periods, up to, but not exceeding, one (1) year in duration. The Company will consider a request for extended Union leave of absence beyond the first year not to exceed one (1) year and the Company will grant such leave of absence if the request is reasonable in the Company's opinion.
>
> 13.0(a) In the event that up to two (2) NABET Employees make a written request for leave for Union business, and it is necessary for them to be replaced, the Union will, upon request from the Company, provide a qualified replacement. In the event such replacement must be paid overtime, the Union will reimburse the Company for any premium costs paid to such replacement; provided, however, any such leave for Union business may not exceed two (2) weeks at any one time.
>
> 13.0(b) It is agreed that upon the return to employment of a regular Employee from the Union or other leave of one year or less, he shall be given his former position and the Company may release the substitute Employee from employment without penalty. The Employee with the least seniority in the seniority group involved shall at all times be the substitute.

8. This Agreement between the Parties also contains a provision dubbed a "Previous Agreements", (TU Aff.11) which states:

> **14. PREVIOUS AGREEMENTS**

14.0: It is mutually agreed between the parties that this Agreement, together with updated side-letters and agreement attached hereto, supersedes all previous Agreements, either oral or written covering Employees employed under the terms hereof, and constitutes the entire Agreement between the parties. Side-Letters attached are: (list omitted)

9. And in another provision, (TU Aff. 12), the Parties agreed that the Company would be afforded broad management rights both express and reserved:

22. MANAGEMENT RIGHTS

22.0 The Union recognizes that the Employer has an obligation to fulfill its responsibilities as a broadcasting licensee under the terms of its grant from the FCC.

22.0(a) Except as expressly abridged by any provision of this Agreement the Company reserves and retains exclusively all of its normal and inherent rights and authority with respect to the management of the business, whether exercised or not, including, but not limited to the right (a) to hire, assign, transfer, promote, demote, schedule, layoff, recall, discipline and discharge its Employees and direct them in their work; (b) to make, enforce and amend from time-to-time reasonable rules and regulations uniformly applied concerning the conduct and responsibilities of Employees, some of which have been set forth in the Employee's Handbook, subject to approval by the Union which will not be unreasonably withheld; (c) to determine and schedule work and programming, acquisition, installation, operation, maintenance, alteration, retirement and removal of equipment and facilities; and (d) to ownership and control of all Company equipment, supplies and property, including the product of any work performed during the course of Employees carrying out job duties as set forth in this Agreement.

10. On May 5, 2017, Nexstar was notified that Roy Schrodt was elected to be Regional Vice President('RVP') of NABET and that he was requesting a leave of absence to attend NABET National Meetings and also to negotiate the local collective bargaining agreement with the Buffalo Sabres.(local National Hockey

League team in Buffalo, New York which has no relationship to WIVB-TV, or the collective bargaining relationship with the NABET and WIVB or its ownership. (TU Aff. 13)

11. At that time, representatives of the union requested that the Company pay Mr. Schrodt for that time in addition to providing the leave of absence. The union was told that the station would grant him the leave of absence, as the contract obligated Nexstar to do, but that the Company would not be paying him for the time that he was doing work for the union, even though Mr. Schrodt had submitted time for this work. (TU Aff, 14)

12. During the same week that he submitted his request or demand for payment, it was brought to company negotiator Theresa Underwood's attention that the WIVB employees who were representing NABET at the table for the current contract negotiations with the Company were putting in a request or demand to be paid for the time spent at the table on their time card as work performed for the company. (TU Aff. 15)

13. The next time the Company and the Union met to negotiate was May 10 and 11, 2017. (TU Aff. 16)

14. On May 11, Ms. Underwood and Lisa Hansen, (Regional Business Manager who was formerly with Media General and was retained by Nexstar) and who was another member of the management bargaining team, had a 'side bar' conversation with Eric Seggi to address this issue. Ms. Underwood explained that on the heels of the union asking that the company pay RVP Schrodt for his time working on behalf of the union, she learned that members of the bargaining team had put in time spent and requested to be paid for time spent at the bargaining table on their time cards and had incorrectly been paid by the

company for the first two negotiation sessions, even though this was not consistent with the business practice of the Company, nor provided for or agreed to in the existing bargaining agreement. (TU Aff. 17)

15. Ms. Underwood told Eric Seggi, NABET Business Representative, that 'we pay employees for work performed for the company, but do not pay employees for work that is performed for NABET or any other organization', reminding him that 'has been the standard approach taken in our previous negotiations with him and NABET in negotiations held in Erie, PA, Syracuse, NY and other stations'. She told Mr. Seggi that 'we would not be paying for Roy to attend NABET meetings or for negotiating the Buffalo Sabres contract.'(TU Aff. 18)

16. Furthermore, she proposed to Mr. Seggi, and asked for his input on whether he wanted to pay the bargaining team directly or if he wanted us to continue to pay them through our payroll and have NABET reimburse the company for that expense as if it. She handed him a printed copy of the language in the contract that details leave of absence and reaffirmed that nowhere in that language did it obligate the company to pay employees during the leave of absence. Mr. Seggi said, did not counter this assertion and said 'that he would look into the situation and get back' to her. (TU Aff. 19)

17. In August 2017 the Company received reimbursement from NABET for the pay that had been provided for work performed by Mr. Schrodt during his leave of absence for NABET. (TU Aff. 20)

18. After receiving the reimbursement from NABET for Mr. Schrodt's leave, WIVB sent NABET an invoice on September 14, 2017 for reimbursement of the money that had been spent to pay employees to bargain for the union at the first two sessions at WIVB-TV. (TU Aff. 21)

19. On October 3, 2017 Jay Lauder, Local 25's Secretary Treasurer sent Mr. Dominic Mancuso, General Manager of WIVB-TV and a member of the bargaining team, a letter rejecting the invoice and raising the union's position that the situation was governed by a 'long standing practice' and the collective bargaining agreement. (TU Aff. 22)

20. WIVB-TV's General Manager Dominic Mancuso sent NABET Local 25's Secretary-Treasurer Jay Lauder, a letter dated November 3, 2017, which stated:

> "I am responding to your letter of October 3, 2017 to Chris Anchin refusing to reimburse the Company for the $8744.67 paid to the three employees who submitted time for "hours worked" when they were, in fact, serving on the union's bargaining committee in the current negotiations being held at the Wyndham. Theresa Underwood advised Eric Seggi in a side-bar that it was Nexstar's consistent practice not to pay Committee members for bargaining as they were not working for the Company by bargaining for their Union. In response, Eric advised us that he would consult with NABET headquarters regarding having the Company reimbursed for these payments and that he would get back to Theresa on this issue. He did not, so we sent him our invoice regarding the payments due and you sent your October 3 letter to Chris.
>
> The contract does NOT require the payment of employees who are negotiating on behalf of the Union. As we have said, it is the Company's consistent practice not to pay for such activity. We have been advised that such a practice is entirely consistent with the law, as pay in such circumstances is not required by either federal or state law.
>
> Absent express agreement with the Union requiring payment by the Company for this time, it is either the Union's responsibility to make such payments or the individual's responsibility to perform the service to their union without charge.
>
> As a result, we request that the Union immediately reimburse the Company for these payments in the amount of $8744.67. We would also ask you to advise members of the Committee not to submit time for future negotiating sessions, since the Union has not arranged for payment by the Company for this time". (TU Aff. 23)

21. In a letter dated November 14, 2017 to Ms. Underwood, Mr. Seggi stated:

"NABET-CWA Local 25 Secretary-Treasurer Jay Lauder has provided me a copy of Dominic's letter dated November 3, 2017 (attached), regarding the request by the company for reimbursement of wages for time the bargaining team members have spent at negotiations.

Based on Dominic's letter, it appears that there is a misunderstanding about my explanation of the Union's position regarding the payment of Union leave for contract negotiations at WIVB. To be clear, the position of the Union is that there is a long standing(sic) practice in place at WIVB that both parties had been following in which the Union has not been charged for payment of the bargaining committee's leave while attending negotiations. The parties have split the expenses for meeting space and meals, if any are incurred. The Union believes this practice should continue until the parties reach an agreement that provides for a different process.

Previous invoices from the WIVB Business office for each bargaining session of these negotiations only included the charges for half of the room fees and meals incurred, consistent with the long standing(sic) practice. The Union has promptly paid such invoices.

Dominic's letter also included a request that members of the bargaining team be asked to not submit their time at negotiations on their time sheets as usual. It is unclear if the company is saying those Employees will not be paid if they submit their time as usual.

If the message is that the company is refusing to continue the standing practice of paying bargaining team members through payroll for negotiation time as usual, then the Union is requesting to reschedule the 11/28 bargaining session to coincide with the off-work hours of bargaining team members.

I look forward to hearing from you on this important matter." *Email from Theresa Underwood to Eric Seggi dated November 17, 2017* (TU Aff. 24)

22. Following this exchange of emails, the parties have continued to negotiate with respect to future dates and arrangements for additional negotiations, and the issue remains open as to whether these will occur on week days, during 'work hours' or after hours, or on weekends. (TU Aff. 25)

II. SUMMARY OF ARGUMENT:

1. **Nexstar Did Not Make an Unlawful Unilateral Change to the Terms and Conditions of Employment of Employees Represented By NABET-CWA When the Company Made a Proposal Seeking Reimbursement for Pay Provided to Union Officials for Collective Bargaining in 2017:**

   A. Since the Union Had Previously Entered into a Collective Bargaining Agreement with the Company:

      1) Which Comprehensively Covered the Issue of Union Leave but Does Not Provide for Pay for Bargaining, and
      2) Also Contains a Clear and Unequivocal Waiver of their Right to Bargain Over the Issues Relating to Union Leave

   B. Since the Proposal Was Entirely Consistent with the Parties' Existing Collective Bargaining Agreement,

   C. Since Making Such a Proposal was Simply a "Mere Continuation of the Status Quo",

2. **To the extent, this Board determines that Any Aspect of this Charge Should be Submitted to a Hearing the Determination of the Charge Should be Deferred to Arbitration Hearing under the Collyer Doctrine**

III. ARGUMENT

1. **Nexstar Did Not Make an Unlawful Unilateral Change to the Terms and Conditions of Employment of Employees Represented By NABET-CWA When the Company Made a Proposal Seeking Reimbursement for Pay Provided to Union Officials for Collective Bargaining in 2017:**

   A. Since the Union Had Previously Entered into a Collective Bargaining Agreement with the Company:

      1) Which Comprehensively Covered the Issue of Union Leave but Does Not Provide for Pay for Bargaining, and
      2) Also Contains a Clear and Unequivocal Waiver of their Right to Bargain Over the Issues Relating to Union Leave;

The unfair labor practice charge addressed by this Motion grows out of a dispute between the

Union and the Company over the arrangements for bargaining a new collective bargaining agreement. The sole substantive allegation posed against Respondent in the Complaint is that it "unilaterally ceased its past practice of paying employees on the Union's bargaining committee for work time spent in collective bargaining negotiations with Respondent." (Complaint, para. 7(a))

A review of the facts, primarily an examination of the agreement between the parties, leads to the conclusion that the Company did not violate the National Labor Relations Act when it sought reimbursement for amounts paid to the union's bargaining committee and otherwise declared it would not pay the Union's bargaining committee when they took leave from their normal work assignments to bargain a new contract on the Union's behalf in the spring of 2017. As a result, the Complaint should be dismissed by the Board as a matter of law. This is the case because the law has recognized numerous circumstances where even action that is wholly unilateral can be taken by an employer with running afoul of section 8(a) (5) and the *Katz* doctrine, as will be discussed below. We set forth four possible exceptions that apply to this situation, each of which, if deemed applicable by this Board, should result in dismissal of this Complaint. In presenting this Motion we press these defenses as they should result in dismissal as a matter of law. In so doing, we reserve additional arguments that are present in the dispute between the Parties, including, but not limited to, the defenses asserted in our Answer that the discussions over this alleged "change" were in fact made "bilaterally" following notice and an opportunity to bargain with the Union, and that the Union has engaged in bad faith bargaining in connection with this alleged "change".

First, in this section of the Brief, we will turn to two exceptions to the *Katz* doctrine developed by the Board and the courts, that provide that even purely unilateral changes can be made because the collective bargaining agreement covers the issue ("the contract coverage standard") or because the Union has waived its right to bargain over the subject ("the contract waiver standard"). In later sections of this Brief, we will discuss circumstances wherein changes deemed "unilateral" can be made because they are either deemed "consistent with the parties' collective bargaining

agreement or the change was made in a way that was consistent with the status quo.

To begin with, it has long been held, absent one of the circumstances noted above, an employer violates section 8(a)(1) and (a)(5) by unilaterally changing terms and conditions of employment. *NLRB v. Katz*, 369 U. S. 736, 743, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) *Honeywell Int'l, Inc. v. NLRB*, 253 F.2d 125, 127, 131 (D.C. Cir. 2001) It has also been held that this "unilateral change doctrine", extends to cases where an existing agreement has expired and negotiations on a new one have yet to be completed. *Id.* at 127-28 (quoting *Litton Fin.*, 501 U.S. at 198, 111 S.Ct. 2215); *see also More Truck Lines, Inc. v. NLRB*, 324 F.3d 735, 738-39 (D.C. Cir. 2003); *Sw. Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986). And each of the various exceptions to its' application apply in the expired agreement context as well, as will be discussed in the context of each applicable exception. We submit that if any one of these exceptions apply the Complaint filed herein should be dismissed.

We turn now to our arguments that the Union "surrendered the[] right to bargain over the ... change[] through either waiver or contract." *S. Nuclear Operating*, 524 F.3d at 1357. First, invoking the "contract coverage doctrine," we assert that the parties arrived at a comprehensive agreement in their 2013 CBA regarding leave from employees' regular work assignments for union business. We will also asset that the "clear and unmistakable waiver standard" articulated in several Board cases, to be discussed fully below, applies due to language agreed to in the parties' 2013 CBA. Several federal appeals courts, as noted herein, have endorsed the NLRB's "clear and unmistakable waiver" rule. On the other hand, two courts have applied the "contract coverage" test to determine whether an employer is privileged to act unilaterally. *NLRB v. United States Postal Service,* 8 F.3d 832 (D.C. Cir. 1993); and *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). Under the standard applied by these courts, where there is a contract clause that is

relevant to the dispute, even if it does not explicitly address the subject at issue, it may be concluded that the parties previously bargained over the subject matter and embodied the full extent of their understanding on it in their agreement. A dissenting member of the NLRB in the *Provena Hospital* 350 NLRB 808, (2007), to be discussed further below, applied this standard and concluded that the hospital acted lawfully with respect to its incentive pay plan as well as regarding the change in attendance policies. We would urge this Board to adopt this standard as the governing principle in cases of this nature as it is more likely to generate just results as it will enforce agreements that the parties have made during their collective bargaining relationship. We see no reason why the "waiver" standard recognized in *Provena,* should not remain as an alternative point of analysis, as it to can serve to effectuate the intent of the Parties. In any event as argued below, applying either standard to the facts of this case, results in a finding that no unlawful unilateral action took place.

1) No unlawful unilateral change under the 'Contract Coverage Standard'

Under the 'contract coverage' standard, which as noted above has been consistently applied by two Circuit Courts of Appeal, where there is a contract clause that is relevant to the dispute, it can be reasonably said that the parties have bargained about the subject and have reached some accord. One court has explained that the 'contract-coverage' standard rests on the rationale that, once a union and an employer enter into a collective-bargaining agreement, "the union has exercised its bargaining right," *United States Postal Service*, 8 F.3d at 836 (quoting *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)), and that the extent to which the agreement fixes the parties' rights therefore presents a question of "ordinary contract interpretation," *Enloe*, 433 F.3d at 839. "[t]his situation is no different than one involving a current collective bargaining agreement, or a situation where an employer must maintain the status quo after expiration of a collective bargaining agreement." see also *Wilkes-Barre Hospital*

Co. v. NLRB, 857 F.3d 364, 376–77 (D.C. Cir. 2017) (applying contract-coverage standard to the terms of a collective bargaining agreement that had expired but that "continue[d] to 'define the status quo'" between the parties, id. at 374 (quoting *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 206 (1991))). Where a collective-bargaining agreement—either operative or expired—is in play, the Board, in considering the agreement's scope, is required to take into account the possibility that the union has chosen to "negotiate for a contractual provision limiting [its] statutory rights." *Wilkes-Barre,* 857 F.3d at 376.

One reviewing court has noted that are important distinctions between the contract coverage doctrine and waiver — a point they state they have repeatedly stressed. *See generally Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016). That court, the D. C. Circuit, has noted that "the question of contractual coverage, one of contractual interpretation, is antecedent to the waiver question," *id.* at 19 n.1, So we will follow that common-sense approach and ask this Board to first consider whether the Company's proposal to require reimbursement from the Union for pay provided to employees for bargaining on behalf of the Union was covered by the 2013 CBA.

The same reviewing Court has stated that "the duty to bargain does not prevent a union from "exercis[ing] its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Postal Serv.*, 8 F.3d at 836 (quoting *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)); *see also S. Nuclear Operating*, 524 F.3d at 1358. Thus, pursuant to the contract coverage doctrine, an employer is "free to make unilateral changes ... without running afoul of the Act" when those changes are "covered by the collective bargaining agreement." *Enter. Leasing*, 831 F.3d at 547 (citations and internal quotation marks omitted).A dispute regarding a subject that is "covered by" a collective bargaining agreement presents "an

issue of contract interpretation," *Bath Marine Draftsmen's Ass'n v. NLRB,* 475 F. 3d 14 (1st Cir. 2007) (citing *Postal Serv.,* 8 F.3d at 836-37), and the D. C. Circuit has held that when parties negotiate for a contractual provision limiting the union's statutory rights, "we will give full effect to the plain meaning of such provision," *Local Union No. 47,* 927 F.2d at 641; *see also Postal Serv.,* 8 F.3d at 836 ("[T]he courts are bound to enforce lawful labor agreements as written...."). Importantly, a subject may be deemed "covered" by an agreement even if the agreement does not clearly and unmistakably address that particular subject. *See Enloe Med.,* 433 F.3d at 837-38; *Postal Serv.,* 8 F.3d at 838; *Connors v. Link Coal Co.,* 970 F. 2d 902, 906 (D.C. Cir. 1992); *Local Union No. 47,* 927 F.2d at 641. Accordingly, in analyzing whether the Company's decision to seek reimbursement for and cease paying the Union's bargaining committee during negotiations for a contract to replace the 2013 CBA was covered by that agreement, it is proper for this Board to consider whether that subject was "within the compass of" the terms of the agreement. *Postal Serv.,* 8 F.3d at 838.

Courts, particularly the D. C. Circuit, have, in applying the 'contract coverage' test to determine whether an employer's unilateral decision is covered by a collective bargaining agreement, have consistently rejected previous Board attempts to require the agreement to "specifically mention," *Enloe Med.,* 433 F.3d at 839, "specifically refer[]" to, *Postal Serv.,* 8 F.3d at 838, or "specifically address," *Connors,* 970 F.2d at 906, that decision. The D.C. Circuit has stated that the Board's approach fails to recognize that "bargaining parties [cannot] anticipate every hypothetical grievance and purport to address it in their contract," *Postal Serv.,* 8 F.3d at 838, and "imposes an artificially high burden on an employer," *Enloe Med.,* 433 F.3d at 837.

An analysis of the collective bargaining agreement between Nexstar and NABET-CWA at WIVB-TV/WNLO-TV reveals that the parties negotiated a lengthy section of the

Agreement to deal very comprehensively with the topic of leaves of absence for union business:

LEAVE OF ABSENCE - UNION AND OTHER

13.0 The Company will endeavor to arrange leave for Union activity upon written request to not more than one (1) Employee at any time for specific periods, up to, but not exceeding, one (1) year in duration. The Company will consider a request for extended Union leave of absence beyond the first year not to exceed one (1) year and the Company will grant such leave of absence if the request is reasonable in the Company's opinion.

13.0(a) In the event that up to two (2) NABET Employees make a written request for leave for Union business, and it is necessary for them to be replaced, the Union will, upon request from the Company, provide a qualified replacement. In the event such replacement must be paid overtime, the Union will reimburse the Company for any premium costs paid to such replacement; provided, however, any such leave for Union business may not exceed two (2) weeks at any one time.

13.1 It is agreed that upon the return to employment of a regular Employee from the Union or other leave of one year or less, he shall be given his former position and the Company may release the substitute Employee from employment without penalty. The Employee with the least seniority in the seniority group involved shall at all times be the substitute.

This provision deals with the topic of union leaves in depth, providing great detail as to their length, process for requesting the leave, limitation as to the number of employees who can be on such leave at one time, 'replacement responsibilities' of the union, reimbursement by the union when overtime is necessary as a result of the leave, reinstatement rights following leave, and rights and release of 'substitutes'. Finally, and perhaps of greatest significance, at no point does it provide for pay to any employees while on union leave.

Against this backdrop of undisputed facts and law, it is clear under the "contract coverage standard" that Nexstar did not make an unlawful unilateral change to the terms and conditions of employment of employees represented by NABET-CWA when the Company made a proposal seeking reimbursement from the Union for pay provided to employee union representative while on leave to engage in collective bargaining in May 2017. This is true because it cannot be disputed that the Union entered into a Collective Bargaining Agreement with the Company which comprehensively covered the issue of Union Leave but does not provide for pay for bargaining. It has been held that a dispute regarding a subject that is "covered by" a collective bargaining agreement presents "an issue of contract interpretation," *Bath Marine Draftsmen's Ass'n v. NLRB,* 475 F. 3d 14, (1st Cir. 2007) (citing *Postal Serv.*, 8 F.3d at 836-37), and the D. C. Circuit has held that when parties negotiate for a contractual provision limiting the union's statutory rights, "we will give full effect to the plain meaning of such provision," *Local Union No. 47*, 927 F.2d at 641; *see also Postal Serv.,* 8 F.3d at 836 ("[T]he courts are bound to enforce lawful labor agreements as written...."). Here the Union's attempt to 'read' a practice into the CBA and then declare that it has been "unilaterally changed" is wholly improper and should be rejected.

2) No unlawful unilateral change under the "Clear and Unequivocal Waiver Doctrine"

We also submit that the Union clearly and unmistakably waived their right to bargain over the issue of pay while on union leave during the term of the 2013 CBA and after any purported expiration of that contract. "A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter...." *Postal Serv.,* 8 F.3d at 836 (citation and emphasis omitted). By waiving the right to bargain over a particular matter, a union "surrenders the opportunity to create a set of contractual rules that bind the

employer, and instead cedes full discretion to the employer on that matter." *S. Nuclear Operating*, 524 F.3d at 1357 (citation and internal quotation marks omitted). It follows that "an employer's unilateral change to contract terms on that subject does not violate the Act." *Enter. Leasing*, 831 F.3d at 546.

In determining whether the Union waived its statutory rights, this Board should consider the language of the 2013 CBA as well as the parties' course of conduct. *See S. Nuclear Operating*, 524 F.3d at 1357-58; *Honeywell Int'l*, 253 F.3d at 133-34. An employer bears the burden of showing that a union clearly and unmistakably waived its statutory rights. *Sw. Steel*, 806 F.2d at 1114-15. To satisfy its burden, the Company must establish that the parties "consciously explored or fully discussed the matter on which the union has consciously yielded its rights." *S. Nuclear Operating*, 524 F.3d at 1357-58 (citation and internal quotation marks omitted).

We contend that the language of the 2013 CBA establishes that the Union clearly and unmistakably waived the employees' right to bargain over pay for bargaining on behalf of the Union. "[G]enerally speaking, waivers of statutory rights must be demonstrated by an express statement in the contract to that effect." *Gannett Rochester Newspapers v. NLRB*, 988 F. 2d 198, 203-04 (D.C. Cir. 1993) (citations, internal quotation marks, and alteration omitted). Consequently, employers cannot rely on contractual silence. *Id.* at 203; *S-B Mfg. Co.*, 270 N.L.R.B. 485, 490 (1984). Nor can "general contractual provision[s]," *Gannett Rochester*, 988 F.2d at 203, or "[e]quivocal, ambiguous language in a bargaining agreement," *NLRB v. Gen. Tire & Rubber Co.*,795 F. 2588 (6th Cir. 1986), meet that standard. It has also been noted that when a particular subject is not "covered by" a collective bargaining agreement, that agreement generally will not "clearly and unmistakably waive bargaining over that matter." *Heartland Plymouth*, 838 F.3d at 26. In this case the subject was, of course, “covered as discussed” at great length supra and the

waiver is backed up and established by extensive language to be discussed below. We submit that the record establishes that the 2013 CBA establishes Union and the Company discussed various aspects of the "union leave" and then "voluntarily relinquished [its] right to bargain over them." *S. Nuclear Operating*, 524 F.3d at 1358 by its' express agreement to an extensive provision on union leave and to other critical provisions ------- dealing with "previous agreements", and management rights --------to be discussed below.

An analysis of the collective bargaining agreement between Nexstar and NABET-CWA at WIVB-TV/WNLO-TV reveals that the parties negotiated a lengthy section of the Agreement to deal very comprehensively with the topic of leaves of absence for union business. This provision, entitled "LEAVE OF ABSENCE - UNION AND OTHER" states:

> 13.0 The Company will endeavor to arrange leave for Union activity upon written request to not more than one (1) Employee at any time for specific periods, up to, but not exceeding, one (1) year in duration. The Company will consider a request for extended Union leave of absence beyond the first year not to exceed one (1) year and the Company will grant such leave of absence if the request is reasonable in the Company's opinion.
>
> 13.0(a) In the event that up to two (2) NABET Employees make a written request for leave for Union business, and it is necessary for them to be replaced, the Union will, upon request from the Company, provide a qualified replacement. In the event such replacement must be paid overtime, the Union will reimburse the Company for any premium costs paid to such replacement; provided, however, any such leave for Union business may not exceed two (2) weeks at any one time.
>
> 13.1 It is agreed that upon the return to employment of a regular Employee from the Union or other leave of one year or less, he shall be given his former position and the Company may release the substitute Employee from employment without penalty. The Employee with the least seniority in the seniority group involved shall at all times be the substitute.

It should also be noted that the agreement contains a strong 'zipper clause' entitled "Previous Agreements":

> 14. PREVIOUS AGREEMENTS

> 14.0 It is mutually agreed between the parties that **this Agreement, together with updated side-letters an agreement attached hereto, supersedes all previous Agreements, either oral or written covering Employees employed under the terms hereof, and constitutes the entire Agreement between the parties.** Side-Letters attached are: (omitted)

We submit that this provision, as a matter of law, sharply limits the agreed-upon relationship between the parties to one which is defined by the **"four corners" of the agreement** entered on March 26, 2013 by Nexstar's predecessor LIN and NABET-CWA. The clear intent of this "Prior Agreements" provision is that the Company and the Union agreed that all prior agreements between the parties would be extinguished or eradicated with their entry into this agreement in March of 2013. They did this in two ways: 1) they agreed that the contract **superseded** all previous agreements, oral or written, between the parties and 2) that it became the **entire agreement** existing between the parties. So, to the extent the Parties had agreed prior to March 26, 2013, or the Employer acquiesced in such an arrangement, to collectively bargain for the 2013 Agreement, during working hours and not "dock" participating union committee members for their time spent bargaining--------that agreement or practice was extinguished on March 26, 2013 by the express agreement of the Parties.

Given this, it clear as a matter of contract interpretation and law that the practice and agreement to conduct negotiations during working hours with accompanying pay would have been extinguished by the parties' 2013 CBA's "Previous Agreements' provision. It has been routinely held, as a matter of contract interpretation, that such 'zipper' clauses bar consideration, or extinguish such past practices or agreements. *Safetrans System*, 119 LA 616, 620-21. (Duff, 2004*), Safeway, Inc*. 120 LA 1217, 1223. (Henner, 2004) (zipper clause barred consideration of past practice). In this context, the Board should apply its 'clear and unequivocal' waiver doctrine to find that the union has

repeatedly and clearly waived the allegedly 'long standing practice' that they base this charge on. (see infra at A.2.a)

And in another provision further supporting the notion of waiver the Parties agreed that the Company would be afforded broad management rights both express and reserved:

> **22. MANAGEMENT RIGHTS**
>
> 22.0 The Union recognizes that the Employer has an obligation to fulfill its responsibilities as a broadcasting licensee under the terms of its grant from the FCC.
>
> 22.0(a) **Except as expressly abridged by any provision of this Agreement the Company reserves and retains exclusively all of its normal and inherent rights and authority with respect to the management of the business**, whether exercised or not, including, but not limited to the right (**a) to hire, assign, transfer, promote, demote, schedule, layoff, recall, discipline and discharge its Employees and direct them in their work;** (b) to make, enforce and amend from time-to-time reasonable rules and regulations uniformly applied concerning the conduct and responsibilities of Employees, some of which have been set forth in the Employee's Handbook, subject to approval by the Union which will not be unreasonably withheld; **(c) to determine and schedule work and programming, acquisition, installation, operation, maintenance, alteration, retirement and removal of equipment and facilities**; and (d) to ownership and control of all Company equipment, supplies and property, including the product of any work performed during the course of Employees carrying out job duties as set forth in this Agreement. (Emphasis Added)

The legal effect of negotiating these three sections of the Agreement establishes that the Union has 'clearly and unmistakably waived' any right to bargain over the topic of union business leave beyond what was negotiated into the 2013 CBA.

This legal effect arises from a series of cases decided in 2007, to be discussed below, when the Board reaffirmed adherence to the "clear and unmistakable"

waiver standard for deciding whether an employer may lawfully unilaterally change the terms and conditions of employment during the term of a collective bargaining agreement where that unlawful unilateral change is alleged to be a refusal to bargain under Section 8(a) (5) and the employer defends on the basis that the collective bargaining agreement contains provisions that privilege the conduct.

Under the "clear and unmistakable" waiver test, the employer's conduct is unlawful unless the contract clause "clearly and unmistakably" waives the union's right to bargain. Given the language in the parties' Agreement and the case law to be noted below, there can be no other conclusion but that the union waived its right to bargain over the pay status of union bargaining committee members.

In *Provena St. Joseph Medical Center, supra*, the Board found that the employer did not unlawfully implement a new disciplinary policy or attendance policy because several provisions of the management-rights clause, taken together, explicitly authorized the employer's unilateral action. Specifically, the management-rights clause provided that the employer had the right to "change reporting practices and procedures and/or to introduce new or improved practices," "to make and enforce rules of conduct," and "to suspend, discipline, or discharge employees." By agreeing to that combination of provisions, the Board found that the union relinquished its right demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failure to adhere to those requirements. By contrast, the Board found that the employer unlawfully implemented a new incentive pay policy because there was no express substantive provision in the collective bargaining agreement regarding incentive pay and there was no evidence that the union

intentionally relinquished its right to bargain over the topic.

The Board continued this approach in *Mission Foods*, 350 NLRB 356(2007) again dismissing a Section 8(a) (5) violation of the Act with respect to the unilateral implementation of a new attendance and tardiness policy.

And in another case, the Board applied the *Provena* 'waiver', analysis to a situation where the written contract had lapsed and had been extended by oral agreements and the parties' course of conduct over the months spent negotiating a successor contract. *Quebecor World Mt. Morris II, LLC and Graphic Communications Conference/ International Brotherhood of Teamsters, Local 65-B. Case 33–CA–15319.* In so doing the Board overruled the administrative law judge's determination that a written extension was necessary to effectuate the waiver established by *Provena* and its progeny stating that the "The judge's view that continuation of the management-rights clause required a written extension of the collective-bargaining agreement is erroneous. It is established law that a collective-bargaining agreement need not be in writing to be enforceable. See, e.g., *Merk v. Jewel Food Stores*, 945 F.2d 889, 895 (7th Cir. 1991); *NLRB v. Haberman Construction Co*., 641 F.2d 351, 355-356 (5th Cir. 1981); *Certified Corp. v. Hawaii Teamsters & Allied Worker*, Local 996, 597 F.2d 1269, 1272 (9th Cir. 1979).

The *Quebecor* Board determined that because the management-rights clause was operative, the relevant language in the clause constituted a "clear and unmistakable" waiver of the Union's right to bargain about implementation of the PIP process, citing *Provena St. Joseph Medical Center*, 350 808, 811–812 (2007).

B. Nexstar Did Not Make an Unlawful Unilateral Change to the Terms and Conditions of Employment of Employees Represented By NABET-CWA When the Company Made a Proposal Seeking Reimbursement for Pay Provided to Union Officials for Collective Bargaining in 2017 Since Said Proposal Was Entirely Consistent with the Parties' Existing Collective Bargaining Agreement,

One can see from a review of these various contract provisions----- leave of

absence, previous agreement and management rights ----that Nexstar's actions, and the ensuing discussions and bargaining it engaged in from May 2017 on, with NABET-CWA representatives in relation to making arrangements for collective bargaining of an new agreement were "entirely consistent with the collective bargaining agreement between it and NABET-CWA, and as such lawful under section 8(a)(5).

The NLRB issued two decisions in 2015 finding that even clear-cut 'unilateral' change in employee working conditions was lawful so long as it was "consistent with the agreement". *Bay Area Healthcare Group d/b/a Corpus Christie Medical Center*, 362 NLRB No. 94 (2015); *American Electric Power,* 362 NLRB No. 92 (2015).

In *Bay Area Healthcare, supra*, the NLRB affirmed a finding by an administrative law judge who found no violation after a company eliminated a contractually extended illness benefit and replaced it with a substantially different plan. The ALJ found that the company had a contractual right to make this change in benefits and, therefore, the union had clearly and unmistakably waived its right to bargain over that issue. In *American Electric Power*, supra, pursuing a somewhat different analysis, but reaching the same result, the NLRB found that a company's elimination of retiree medical benefits for future hires was based on a reasonable interpretation of a collective bargaining agreement and, therefore, the company had a "sound arguable basis" for making the change. The NLRB stated that it will not find a violation of the Act if the employer had a "sound arguable basis" for its belief that the agreement authorized the action. In addition, the NLRB explained that where the dispute is solely one of contract interpretation and there is no evidence of anti-union animus, bad faith, or intent to undermine the union, it will not seek to determine which of two equally plausible contract interpretations is correct.

In the instant case, Nexstar, in submitting a request for reimbursement for monies that it had paid to the NABET bargaining committee, was acting at the heart of its sphere of managerial rights to schedule work and conduct its operations in an orderly fashion. And it is also clear that Nexstar had a "sound arguable basis" for its belief that the agreement authorized the action. As such in these respects it was acting "consistent with the collective bargaining agreement" between the parties, just as the employers in *Bay Area Healthcare, supra* and *American Electric Power, supra* were in making the changes authorized by the contract.

And even if it is determined that the 2013 CBA had effectively expired, this exception to the *Katz* doctrine still applies. In this circumstance, to avoid running afoul of the unilateral change doctrine, an employer must maintain the status quo as to terms and conditions of employment after the expiration of a collective bargaining agreement. *See Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 543-44 nn.5-6, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988). The primary dispute in this case concerns the proper determination of the post-expiration status quo. Because an employer's obligation to maintain the status quo derives from the Act, not from the agreement, *see More Truck Lines,* 324 F.3d at 738-39; *Honeywell Int'l,* 253 F.3d at 128, 131, certain terms of an expired agreement extend beyond the agreement's expiration and continue to "define the status quo," *Litton Fin.,* 501 U.S. at 206, 111 S.Ct. 2215 (emphasis omitted). Otherwise put, the unilateral change doctrine requires employers "to honor the terms and conditions of an expired collective-bargaining agreement." *Laborers Health & Welfare Trust Fund,* 484 U.S. at 544 n.6, 108 S.Ct. 830. In defining the post-expiration status quo in this case, therefore, we look to the substantive terms of the 2013- CBA. *See NLRB v. Cauthorne,* 691 F.2d 1023, 1025

(D.C. Cir. 1982); *E.I. Du Pont De Nemours,* 364 N.L.R.B. No. 113, at *5 (Aug. 26, 2016); *see also Intermountain Rural Elec. Ass'n v. NLRB,* 984 F.2d 1562, 1567 (10th Cir. 1993) (noting that "the contract language itself ... defines the [post-expiration] status quo"). As a result, since the Nexstar's actions regarding bargaining committee pay were "consistent with the collective bargaining agreement" as set forth above, they were also consistent with the duty to maintain the status quo, and thus not a violation of the Act.

C. Nexstar Did Not Make an Unlawful Unilateral Change to the Terms and Conditions of Employment of Employees Represented By NABET-CWA When the Company Made a Proposal Seeking Reimbursement for Pay Provided to Union Officials for Collective Bargaining in 2017 Since Making Such a Proposal was Simply a "Mere Continuation of the Status Quo",

As the facts noted above make clear, the parties engaged in considerable amount of discussions and exchange of correspondence regarding bargaining arrangements, including pay for union committee members, once the issue came to light as a result of the union's demand for reimbursement for payment for the Union local President's service as a negotiator for the Union in collective bargaining negotiations with the Buffalo Sabres. We can certainly presume that similar discussions took place leading up to the 2010 and 2013 negotiations which resulted in the two previous collective bargaining agreements between the parties. As such, it represented no departure at all from past practice as to how these arrangements were made, only a memorialization and reiteration for emphasis of same.

Given these indisputable facts, the Union cannot seriously argue that the initial submission of this proposal was anything "new" at all, but rather was essentially "a mere continuation of the status quo." *E. I. du Pont De Nemours & Co. v. NLRB,* 682 F.3d 65, 67–69 (D.C. Cir. 2012), under which on previous occasions, the Parties' had engaged in

similar discussions. In this vein, as it is apparent that since negotiations led to the Parties' prior agreements regarding the topic of union leave and bargaining arrangements, the force and logic of the D. C. Circuit's decision in *DuPont*, now followed by the Board's decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017) ("*Raytheon"*) applies in that there was nothing about any of the discussions held in 2017 that was anything other than a 'continuation of the status quo'. And this is true even if it is determined factually that the Company acted 'unilaterally' just by initiating the discussion. In the *DuPont* case the D.C. Circuit stated:

> Under *Katz*, an employer unilaterally may implement changes "in line with [its] long-standing practice" because such changes amount to **"a mere continuation of the status quo**." 369 U.S.at 746, 82 S.Ct. 1107; *see Courier–Journal*, 342 N.L.R.B. 1093, 1094 (2004) ("a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section (a)(5)"). 682 F.3d 65, 67–69

As the *DuPont* court also stated:

> "The purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes. For this reason, an employer may lawfully change the terms of employment pursuant to such an established practice…….. We hold Du Pont, by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice; those changes were therefore lawful under *Courier-Journal*. 342 NLRB at 1094. (Emphasis added) 682 F.3d 65, 67–69

Late last year, the Board decided the case of *Raytheon, supra,* overruling the Board's eventual decision on remand in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) ("*DuPont*"), which limited the changes employers can make unilaterally in a union environment. *Raytheon* clarified the degree to which employers may rely the past process for making changes to make unilateral changes to terms of employment once a collective bargaining agreement has expired.

At issue in *Raytheon* was the company's practice of making annual changes to the medical benefits it offered to union and non-union workers alike. Collective bargaining agreements covering the years 2000-2012 allowed the company to amend the terms of the health benefit plan. Consequently, over that period, the medical plan changed in some respect each year: increased premiums, different medical options, changes in deductibles and co-payments. The union did not object to, or seek to bargain over, any of these changes. The union sought to change this practice at the end of the 2009-2012 contract term. It proposed that health benefits remain fixed throughout the four-year term of the contract, rather than being modified annually, as in the past. The company would not agree, and the contract expired in April 2012 while the parties still were negotiating. Bargaining unit employees continued to work under the status quo terms and conditions of employment.

In the fall of 2012, following its usual practice, the company unrolled its new medical benefit plan, which (as in previous years) differed from the prior year's plan in several respects. Relying on *DuPont*, the union filed an unfair labor practice charge alleging a failure to bargain under Section 8(a)(5) of the National Labor Relations Act ("the Act"). It argued that, in the absence of a collective bargaining agreement, the company's modification of medical benefits was a mandatory subject of bargaining, even if the company had a well-established pattern of making these changes over the years.

The Board overruled the 2016 Board *DuPont* decision on remand, which it characterized as "fundamentally flawed" and inconsistent with the Board's longstanding precedent in this area. While an employer may not unilaterally change the status quo as to a mandatory subject of bargaining, "actions constitute a "change" only if they materially differ from what has occurred in the past." 365 NLRB No. 161, p. 10. An established past

practice – whether or not derived from the management rights clause last in effect — may become part of the status quo. The Board in *Raytheon* also rejected the notion that any action involving an employer's discretion will always constitute a change in terms and conditions of employment. The relevant consideration is whether the challenged action constitutes a substantial departure from past practice, regardless of how that past practice developed. Rather than constitute an unlawful unilateral change, an action taken pursuant to an established practice preserves the status quo. *See Katz,* 369 U.S. at 746, 82 S.Ct. 1107; *E.I. Du Pont,* 682 F.3d at 67-68; *see also Aaron Bros. Co. v. NLRB,* 661 F. 2d 750, 753 (9th Cir. 1981)

2. To the extent, this Board determines that Any Aspect of this Charge should be Submitted to a Hearing the Determination of the Charge Should be Deferred to Arbitration under the Collyer Doctrine

Upon review of the facts and argument above we believe that this Board will properly conclude that no violation of the Act has occurred in connection with Nexstar's proposal that it be reimbursed for monies paid to the Union's bargaining committee. More specifically, we believe that the Board should, and will, conclude that no unilateral change in violation of section 8(a)(5) can be established because the reimbursement proposal was either 'covered by the contract', the subject of a 'waiver' by the Union, a "mere continuation of the status quo" or "entirely consistent" with the Parties' collective bargaining agreement. But if the Board were to determine that any aspect of this Charge has potential merit or requires a hearing on any factual issues present, we believe that it is crystal-clear based on long-established precedent that this case should be deferred to arbitration, rather than determined in an unfair labor practice proceeding.

The Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution

of disputes *See United Technologies Corp.*, 268 NLRB 557, 558–59 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 840, 842–43 (1971). Under this doctrine, so long as an alleged violation of the Act is covered by the parties' grievance-arbitration agreement, the Board will defer the dispute to that process if certain conditions are met. *Id.*

Specifically, the Board will defer a potentially meritorious unfair labor practice charge to the parties' contractual grievance-arbitration procedure where: 1) the conflict arises out of a long and productive bargaining relationship, 2) there is no claim of employer enmity towards employees' exercise of protected rights, 3) the arbitration clause covers the dispute at issue, 4) the employer manifests a willingness to arbitrate the dispute, and the alleged unfair labor practice lies at the center of the dispute. *United Technologies Corp.*, 268 NLRB at 558; *Collyer Insulated Wire*, 192 NLRB at 843.

All these factors are present here. The parties have had a long and productive relationship and there is no viable claim of employer enmity toward the employees' exercise of protected rights. As established during the investigation of this matter there is no dispute that the collective bargaining agreement contains a broad arbitration clause and the Company is willing to arbitrate the dispute underlying the dispute.

While the Union may assert, to avoid deferral of this dispute, that the contract has expired, the parties had agreed to extend the contract orally beyond its stated expiration date of March 25, 2017. This matter was discussed and agreed upon between then union representatives and Theresa Underwood at the end of the very first sessions the parties held on February 23 and 24, 2017 as it became evident that negotiations would likely ensue for quite some time past expiration. (TU Aff. 8) Over the months that followed. the parties continued to observe all provisions of the contract. In any event, it is well-established that even if the contract has now expired, arbitration is still

appropriate to determine matters arising during the term of the agreement. *Litton Financial Printing Division v NLRB,* 501 U.S. 190, 198, 137 LRRM 2441(1991). In *Litton,* the Supreme Court held that where post-expiration grievances assert rights that "arise under" the expired agreement or may be "vested" or "matured' under that agreement, the duty to arbitrate may continue as to such agreements by operation of contract law.

Given the presence of these factors, there is no doubt that this case should be deferred to the mechanism established by the Parties' Agreement. The Board reasons that since it is fundamental to the concept of collective bargaining that the parties to a contract be bound by the terms of their agreement, it would be detrimental to "jump into the fray" and preempt that agreement. *United Technologies Corp.*, 268 NLRB at 559.

As the Board wrote in *United Technologies Corp.*, "dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract." *Id.* (quoting *National Radio Co.*, 198 NLRB 527, 531 (1972)). Thus, adjuring the parties to seek resolution by means of their own making fosters "both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement." *Id.* (quoting *National Radio Co.*, 198 NLRB 527, 531 (1972)). There are additional rationales for deferring Section 8(a)(5) charges in particular. First, in many Section 8(a)(5) cases the issue is whether the employer had a contractual right to take the action contested, and any violation of the Act in such cases turns entirely on contract interpretation *See Roy Robinson Chevrolet*, 228 NLRB 828, 832 (1977) (Murphy, C. concurring) (agreeing that since the dispute centered on a matter of contract interpretation, deferral was preferable).Therefore, unlike Section 8(a)(1) and (3) cases, which require the decisionmaker to interpret the Act, these Section 8(a)(5) cases do not require the Board's expertise *See General American Transportation Corp.*, 228

NLRB 808, 810–11 (1977) (Murphy, C. concurring) (arguing deferral is not appropriate when it would require the arbitrator to interpret the statute), *overruled by United Technologies Corp.*, 268 NLRB at 557. Indeed, the Board has recognized that matters of contract interpretation "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute *Collyer Insulated Wire*, 192 NLRB at 839." Furthermore, it would be particularly detrimental to the goal of promoting stable labor-management relationships through collective bargaining if the Board were to interpose itself in a matter of contract interpretation. Resolution of disputes arising out of contractual provisions are best left to the parties through the steps of the agreed-upon grievance procedure, as well as by the arbitrator specially chosen to interpret the contract. *Id.* at 840.

Ultimately, *Collyer* is founded on a policy of holding the parties to their contractual obligations. And here NABET-CWA should be obligated to follow through on that obligation in the event the Board determines that there are factual issues which need to be determined to adjudicate this Charge.

D. CONCLUSION

Given these facts and the argument set forth herein, it is apparent that there is no merit whatsoever to the instant charge filed by NABET-CWA, and as a result, the Charge should be dismissed. The Company has not made any unlawful unilateral changes to the wages, hours or other working terms and conditions of employment of the employees in the unit represented by the Union. However, if the Board finds any reason to conduct a hearing in relation to this Charge, we submit that this Charge be deferred to

the Parties' arbitration process established by their collective bargaining agreement for resolution.

For all of the reasons set forth herein, this Board should enter an Order dismissing NABET-CWA's charge in its' entirety.

NEXSTAR BROADCASTING, INC. d/b/a WIVB-TV

_____

By: Charles W. Pautsch
PAUTSCH, SPOGNARDI & BAIOCCHI LEGAL GROUP LLP

Dated: September 6, 2018

Charles W. Pautsch
PAUTSCH, SPOGNARDI &
BAIOCLEGAL GROUP LLP
233 South Wacker Drive
Suite 2200
Chicago, IL 60606
414-810-9944
cwp@psb-attorneys.com

AFFIDAVIT OF SERVICE

I hereby certify that I served the foregoing BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT on counsel for the Charging Party Union, Judiann Chartier by e-mailing a copy of same to jchartier@cwa-union.org , the Counsel for the General Counsel, Eric Duryea, by emailing a copy of same to Eric.Duryea@nlrb.gov. and the Regional Director for Region 3, Paul Murphy, by emailing a copy of same to Paul.Murphy@nlrb.gov.on September 6, 2018.

_____

Charles W. Pautsch